IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, *Plaintiff in Error,* vs. TONY CURTZ, a minor, by AGNES CURTZ, guardian *ad litem,* *Defendant in Error.*	No. 2098.

UPON WRIT OF ERROR FROM THE UNITED STATES CIRCUIT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, WESTERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR

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STATEMENT OF THE FACTS.

This action is brought by Tony Curtz, by his mother, Agnes Curtz, his guardian *ad litem,* to recover damages for an injury received on the 12th day of September,

1908, while sweeping wheat in a car standing on a switch track in defendant's railroad yards in the city of Tacoma.

These railroad yards extend along the waterfront a distance of six or seven miles and occupy a space bounded by the water on the east side and a bluff on the west side, the city being built on the bluff above the tracks. This space between the water and the bluff is of varying width, so that in the narrow places there are few tracks, while where the space is wider there are a great many tracks.

Along the waterfront are constructed docks and warehouses, then next to the warehouses on the side away from the water is a street, and the yard and tracks of the defendant company are west of the street, between the street and the bluff. The situation is best described by the witness J. P. Farley, as follows:

"In going to the docks we usually drive down 21st street or 15th street to as far north as 9th street. We drive from 21st street to 15th street on the brick pavement and from 15th street follow Dock street straight north. The Municipal Dock is the first one north of 11th street, and then the Alaska Pacific Dock, then the London Dock, then the Balfour-Guthrie Grain Warehouses and then the Eureka Dock. Between 11th street and 15th street there are six tracks. The one on the east side crosses Dock street at the 11th street bridge, then runs on the east side of Dock street close up to the warehouses. The waterfront is east of Dock street. I would be down there some three or four times a day with my team, and I have seen men and children getting wheat out of the cars quite frequently.

The yards are on the west side of Dock street, and they run from Prescott clear to the Smelter, a distance

of six or seven miles, but the most tracks are between 11th and 7th streets. At the foot of 9th street there are probably 50 or 60 tracks, and usually five or six switch engines are working in there and the switchmen are kept quite busy with their work. I never saw them order children away, but they may have done so."

Record, pp. 38-39.

At 11th street an overhead bridge is constructed over the tracks.

There is a switch track which leaves the main line at 15th street, running north on a curve to the east between the main line track and Dock street until near 11th street, where it crosses Dock street to the east side thereof; running thence north along the east side of Dock street next to the grain warehouses mentioned by the witness Farley. This track is spoken of as the "grain lead," and is used in switching cars loaded with grain to these warehouses. When the cars are unloaded they are sometimes shoved south on this track across Dock street at 11th street and left standing on the curve between 11th and 15th streets. At the time of the injury to the plaintiff there was a string of eighteen cars standing on this portion of the track, the north end of the string being about seventy-five feet south of 11th street and the south end just in the clear of the main line at 15th street.

The witness Raymond describes it:

"Q. Was there a string of cars reaching from near 11th street south to about 15th street?

A. There was a string of cars. I was pretty near up to the end of the cars when the engine hitched onto them,

and that was, I should judge, about 75 feet south of the 11th street bridge.

Q. And the other end of the string was down—it was somewhere—

A. It was somewhere in the neighborhood of the Pacific Fruit, along in there, about 15th street. It was over in the yards.

Q. That would be a distance of about six or seven hundred feet, wouldn't it?

A. I think it is in the neighborhood of five or six hundred feet.''

Record, pp. 40-41.

Witness Edward C. Trow testified that there were about eighteen cars in the string, and that these cars were standing on a curve, the inside of the curve being the west side of the track, which is the side away from the water, and that they came in on this track with the engine at 15th street and coupled onto the south end of the string of cars.

Record, p. 53.

Switchman Housman testified:

''The cars were standing on a switch track which connects with the main track close to 15th street, and the south end of the cars were just in the clear at 15th street. We came in with the engine from 15th street switch and I coupled onto the cars.''

Record, p. 56.

The defendant in error, at the time he was injured, was eleven years old, and lived on Yakima avenue, about a mile from the place of injury. In the morning his mother left home for the purpose of ''nursing a sick

lady who lived across the street," and testified: "I left home about eight o'clock in the morning of September 12, 1908, and at that time Tony was in the yard trying to cut wood and kindling, which he was carrying upstairs where we lived, as we lived on the second floor of the house. His two smaller brothers and Maggie Slabb, his cousin, were with him." (Record, p. 23.) The Slabbs lived on the first floor of the same house.

Tony testified that after his mother went away his cousin, Maggie, asked him if he wanted to go down after wheat with them, and that he and Maggie and her younger brother took a little red wagon and a cart, and "we took brooms with us, and I had a broom that the handle had been broken off so that the handle was about a foot and a half long, and I was using this to sweep up the loose wheat in the car. I got this broom out of the barn where we lived." (Record, p. 27.) They went down the steps at 11th street bridge into the railroad yards, and from there went over to these cars standing on the switch south of the 11th street bridge and west of Dock street. "We walked up the dock a little ways. We did not see anything up there and we started back. * * * The door of the car was in the side of the car and we left the wagon and cart at the side of the car, about two feet from it. The cars were this side, that is, south of the 11th street bridge, and about as far as across the street." They climbed into the cars, Maggie getting into one car and Tony into another, and, while they were sweeping the loose wheat up from the floor of the car, the cars were moved by the engine coupling onto the south end of the string, the plaintiff saying: "I know that the

engine gave the car a big jerk and knocked me right out and I did not know anything at all after that until I found myself in the hospital and my leg had been taken off." (Record, p. 26.) He further testified that the car he was in was the end car on the north end of the string of cars standing there, and that he had not seen any engine or cars moving about there, and that he was going to take the wheat home to feed the chickens. (Record, pp. 26-27.)

The evidence of the plaintiff is corroborated by his cousin, Maggie Slabb, who further testified that "he left his wagon right in front of the car door and I left mine in front of the door of the car about two or three feet away from the door. I think it was on the water side. * * * When we went down the steps onto the tracks we then went south about the distance of across the street from the bridge to the cars. * * * I never saw any engine and did not see any cars moving. * * * We went down to where the cars were and I got up in a car, but I do not know whether my brother got into one or not, and I did not see what car Tony got into. I do not remember how I got into the car, but I climbed up into the car some way, but there was no ladder there. * * * We were getting the wheat for ourselves, and I do not know who the wheat belonged to. * * * There was not very much wheat in the car. We had just swept it up when the train bumped. I had a little dustpan full, that is all." (Record, pp. 28, 29, 30.)

The only eyewitness to the accident was Mr. F. L. Raymond, a teamster for the Tacoma Truck Company,

who had just finished loading at one of the warehouses near 11th street and was driving south on Dock street, and he described the accident as follows:

"When I first seen the boy I seen him when the cars hit. When I first seen him, as near as I can remember now, he was beside the train, but when the engine hit he got down on his hands and knees and crossed the rail right in front of the rear trucks, on the east side of the car, and picked up either a broom or a shovel, a short-handled broom or shovel, just as the train started, and when the train started I am pretty sure the wheels did not run over the boy because there was no blood there. As near as I can figure it out, there is one of the bolts that comes through the bolster that caught in his clothes and jerked him along and rubbed him on the ties and broke his leg and mangled it all up. * * *"

Record, pp. 42-43.

Then, in answer to questions propounded by a juror, this witness testified:

"Q. You saw the train when it hooked onto the car, when it made the coupling?

A. I saw the car at this end move.

Q. You saw it when it made the coupling?

A. Yes.

Q. And you saw the boy at the same time on the ground?

A. Yes, sir.

Q. You did?

A. Yes.

Q. Then he could not have been in the car when the coupling was made?

A. I do not think he could.

Q. He was stooping over?

A. After they had coupled the cars, as near as I can figure it, after they had coupled onto the cars, he went to get his broom, not thinking about the cars starting up, went to get his broom for fear he would lose it, as near as I can see; and he crawled over and reached in front of the rear trucks, and just as the car started he threw himself around with his broom or shovel or whatever it was in his hand, and the bolt that is below the bolster caught in his clothing and dragged him and crushed the leg all along there. The switch crew and myself examined the track and I could see no blood on the rails or on the car where the wheel had run over him.

Q. That was just an ordinary coupling, was it?

A. That was just an ordinary coupling that they make every day."

Record, pp. 44-45.

The witness J. W. Clark was working for the telephone company, loading poles on a wagon, at the time of the accident. These poles were on the west side of Dock street and between Dock street and the track on which the cars were standing. He had noticed the plaintiff and his two cousins going north along Dock street and passed where he was working about fifteen minutes before the accident, and the first he knew of the accident was when he heard persons hollering and looked up and saw the plaintiff being dragged by the car. Prior to that he had not seen any switchmen around there, and the switching crew were on the other side of the cars.

Record, p. 58.

Switch Foreman Trow testified: "The track these cars were standing on is on a curve, the inside of the curve

being the west side of the track, which is the side away from the water. It is the duty and custom of switchmen to work on the inside of the curve, so that they can see the cars the full length of the string in order to know that they are all coupled together and move when the engine starts to pull out. We could not see along the opposite side of the string of cars, as our view would be shut off by the body of the cars. Nor could we have seen had we been on the other side, on account of the curve, without going across Dock street toward the water. I had not seen any children about the cars before that time and did not know that any were there." (Record, pp. 53-54.) Again: "There were none of my crew on the water side of the train on account of the curve, and if they had been they could not have seen the rear cars without going across Dock street over to the bay side. This track does not run in Dock street, but parallels the street and then crosses it on an angle up at the 11th street bridge. I do not think you could see the north end of the cars by going out to the middle of Dock street. * * * It is customary in switching in the yard for you to get on the side where you can see the rear car. It is not customary to walk back, be cause there is not supposed to be anybody underneath or around the cars unless there is a blue flag placed there by the car men. That signifies there is a man about the car or underneath, but in the yards it is customary to go and couple on at any time during the day or night and start the movement of the cars without going back. The only occasion or reason a person would go back was simply because the cars were not coupled

together. If you can see the rear end coming, that is sufficient. But if it is dark and a man cannot see them, a man goes back to be sure he gets all the cars." (Record, pp. 55-56.)

The evidence of Trow is corroborated by switchmen Housman and Hughes, who were the other two members of the crew handling these cars. All of them came in with the engine from the south, and none of them were near the plaintiff at or before he was injured, or knew that the plaintiff or any other children were in or around the cars.

It was shown by the evidence of the witness Cumming that a special watchman is put on duty by the defendant during the season of the year when grain is being handled for the purpose of keeping unauthorized persons out of the yards and away from the cars. "I put a special watchman on during this season of the year when wheat is coming in, in addition to the regular watchman, and at the time this boy was hurt I had a man by the name of F. K. Wiley especially employed and instructed to keep small boys out of the yards and from jumping on moving trains, etc. * * * Mr. Wiley was on during the grain season of 1907 and 1908. During that time we had two watchmen in the Moon Yard and one at the head of the bay.

Q. And what were your instructions to them in regard to children found in the yard?

A. To arrest them if they found them taking wheat from whole sacks or knifing the sacks. Sometimes they would knife the sacks and let the wheat run out, and come back and claim that they found it on the ground,

and so forth. I especially instructed them to keep these boys out for fear of any accident."

Record, p. 52.

Mr. A. A. Dikeman, foreman for the Balfour-Guthrie Warehouses, which are located north of 11th street, testified:

"I have repeatedly ordered boys away from our premises and away from cars that were unloaded, and I have given orders to our men who were working there that when boys came to order them away and not allow them there at all. I have done this ever since I have been foreman."

Record, p. 51.

The plaintiff and his cousin, Maggie Slabb, were permitted to testify, over the objection and exception of the defendant, to a conversation claimed to have been held between them and a man standing at a switch stand under the 11th street bridge when they first went down onto the tracks. This man they said wore a blue jacket and overalls, and appeared to be turning a switch, and directed them to the cars for the purpose of getting the wheat. This evidence will be set forth hereafter in the assignment of errors and discussed later in this brief.

At the close of the plaintiff's evidence, the plaintiff in error challenged the sufficiency of the evidence by a motion for a non-suit, which motion was overruled and an exception allowed.

Record, p. 50.

At the close of all the evidence in the case, the plaintiff in error moved the court for an instructed verdict,

which motion was denied and an exception allowed.

Record, p. 59.

A verdict was returned by the jury in favor of the defendant in error, and the plaintiff in error, within the time provided by law, filed its motion for judgment *non obstante veredicto*. (Record, pp. 18-19.) Which motion was by the court denied. (Record, p. 20.)

ASSIGNMENTS OF ERROR.

The following errors are assigned:

I.

"The Honorable Circuit Court erred in admitting incompetent and immaterial evidence prejudicial to the defendant, as follows:

"The following evidence of the plaintiff, to-wit: 'We went down the steps at the 11th street bridge and we went up the dock a ways and then came back and met a man there. He had on a blue jacket and overalls, and he says, "Good morning." He had hold of a piece of iron which had kind of a round iron on the top, and he was turning that around. I did not know what it was at the time, but I have since learned it was a switch. He said "good morning" to us, and we said "good morning," and he asked what we came for, and we told him we came for wheat, and he says to us, "there's lots of it over there in them cars," and he pointed his finger and said, "you'd better hurry over before the other boys and girls get it." '

The following evidence of the witness, Maggie Slabb, to-wit:

"There was a man there on the tracks under the bridge turning something, and says: 'Hello, boys and

girls,' and we says, 'Hello,' and he says, 'What are you after?' and we says, 'We are after wheat,' and he pointed his hand and shows us some cars on the track there and said there was lots of wheat we could get there because other people were getting some there, too."

The following evidence of the witness Mark Maloney, to-wit:

"Q. When you were down there getting wheat before, and you saw these railroad men there, did you have anything to say to them about getting wheat?

MR. QUICK: We object to that as incompetent, irrelevant and immaterial.

MR. BATES: The only object is to show that they knew these boys were there to get wheat.

THE COURT: You may ask him whether they objected or not.

MR. QUICK: We except to the ruling.

A. No; sometimes they told you to go ahead where there was some wheat. Told you where there was some. Pointed it out to you."

The following evidence of the witness Edwin Wolfe, to-wit:

"I had been going down in the railroad yards for about a year before Tony was hurt, whenever my mother would let me, which would be four or five times a week sometimes, and other times not more than once a week. I went down there to get wheat."

MR. QUICK: We object to this line of evidence.

THE COURT: Objection will be overruled. The only purpose of this testimony is to show knowledge on the part of the company, and it is admitted for that purpose. The defendant is allowed an exception.

"When I would go down in the yard to get wheat before Tony was hurt I have seen other children and men down there getting wheat. Sometimes there would be one, two or three, and sometimes none. I would see the switchmen down there handling the cars, and they have told me——"

MR. QUICK: I object to that as incompetent.

MR. BATES: I do not want to get over the rule, but I want to show that these men were after wheat in the car, that is all.

MR. QUICK: If they did know it, it would not bind the company.

THE COURT: The objection is overruled and exception allowed."

II.

The Honorable Circuit Court erred in overruling the motion of the defendant for a non-suit made at the close of the evidence of the plaintiff.

III.

The Honorable Circuit Court erred in overruling the motion of the defendant for an instructed verdict made at the close of all the evidence in the case.

IV.

The Honorable Circuit Court erred in instructing the jury as follows:

"If you find that at the time of the injuries complained of in the complaint, and for some time prior thereto, children and other persons were in the habit of continuously going upon the premises in question and into the box cars situate upon the defendant's track and sweeping the wheat up and gathering the wheat from

in and about said cars, and if the defendant, its servants and employes knew of such custom, or by the exercise of ordinary care and observation could have known of it, then I instruct you that the defendant railroad company owes the duty to persons so going upon the cars or track to use reasonable care to avoid injuring them. By reasonable care is meant that degree of care that an ordinarily prudent man would use under like circumstances and conditions. The degree of care to be exercised may be measured by the danger to be apprehended.

"You are instructed that in determining whether or not the defendant, its servants and employes were guilty of negligence causing the accident, and in measuring the standard of care to be used by the defendant and its servants and employes at and about the point where, and the time when, the accident occurred, you should take into consideration the custom and habits of children and the public generally in going in and upon the cars and tracks of the defendant for the purpose of getting wheat, and that due and ordinary care should be used to prevent accidents to not only men and women of mature age and experience, but also to children of tender years who might have occasion to be in or about said cars, or might have been in the habit of being in or about said cars."

V.

The Honorable Circuit Court erred in overruling the motion of the defendant for judgment notwithstanding the verdict.

ARGUMENT AND AUTHORITIES.

Assignments of Error numbers 2, 3 and 5 relate to the sufficiency of the evidence to sustain the verdict and judgment. We will, therefore, discuss this proposition first, for the reason that if our contention is sus-

tained a consideration of the other assignments of error will be rendered unnecessary.

The defendant in error at the time he was injured was a trespasser for the following reasons:

First. He was not on the premises and in the cars of the Railway Company for the purpose of transacting any business with the Railway Company or its agents.

Second. He was not there by the invitation, permission or acquiescence of the Company.

Third. He was there for an unlawful purpose.

The defendant in error and his companions had gone into the railroad yards upon the private premises of the Railway Company, and into its cars, for the purpose of obtaining wheat which they knew did not belong to them and which they were going to carry home to feed to their chickens. It will doubtless be contended by counsel for defendant in error here, as they did before the jury, that the Railway Company did not do all that it could have done to prevent persons from going into its yards and upon its premises for the purpose of stealing wheat, but whether it did all that it could have done is not the test for determining acquiescence. If it objected to the presence of these persons and made any effort to keep them away, then it did not acquiesce, and the persons thus entering upon its premises are trespassers. Again, if a person goes upon the premises of another for an unlawful purpose—to commit a crime, as in this case—then as a matter of law there can be no acquiescence and such a person is a trespasser. There

is no dispute but that the Railway Company employed an extra watchman in its yards during what is termed the "grain season," whose duty it was to keep persons out of the yards and prevent the larceny of wheat, and who was especially instructed to keep children away from the cars. This act of the Company refutes any possible suggestion of acquiescence on its part. The fact that switchmen engaged at work in the yards did not chase persons away is accounted for in the evidence by the fact that the switchmen are very busy in the performance of their duties. In a large terminal yard such as this one, extending a distance of six or seven miles along the waterfront, where a number of switching crews are constantly busy moving the hundreds of freight cars that are handled every day in these yards, the Company owes the duty to those engaged in shipping and receiving freight to handle these cars with reasonable dispatch and promptness, besides making up its trains in the yards. The trainmen and switchmen, therefore, can not be expected or required to leave their work for the purpose of chasing people out of the yards or examining every car in a long string to see if some trespasser is in the car stealing wheat or some other article of shipment.

The evidence shows there were eighteen cars in this string of cars standing on the track, which would make the string about 650 feet long. The switching crew came in at the south end and coupled onto the cars and started to pull them out. These children were in the cars near the north end of the string, and entered the same from the east side while the switchmen were all

on the west side of the cars, which would place them on the inside of the curve of the track. They did not see or know, and could not see or know, that these children were in the cars unless they waited until one of the switchmen could walk almost the full length of the string and make an examination of each car for the purpose of determining whether some unauthorized person was trespassing therein. The little wagon and cart which these children had with them was also on the east side of the cars and within two or three feet of the cars, so that they could not be seen and were not seen by the switchmen. Even the two witnesses who were working near these cars did not know that the children were in the cars. The witness Raymond testified that he was loading at the dock under the Eleventh street bridge, and said:

"A. I had been there, I could not say. I think it was my second trip that morning. I make three trips in the forenoon, and that was my second trip. I do not remember how long I had to wait before I got my load. There was a couple of teams ahead of me. We have to take our turn. I do not know just exactly how long that was.

Q. Had you seen Tony Curtz before he got hurt?

A. No, sir. I did not see him while I was loading there. The first I seen of him was when the train hooked on.

Q. Where were you loading?

A. I was back in under the 11th street bridge. There are two places we can back in, and I was in the middle place on the left-hand side facing south, the middle place I got my load of sugar.

Q. Had you seen any children around there?

A. I had not seen any children around there at that time.

Q. Did you notice any switchmen around there?

A. I did not notice any switchman, no, sir."

Record, pp. 41-42.

The witness Clark, who was loading poles which were between the cars and Dock street, and about 150 or 175 feet from where the accident occurred, testified:

"When I saw the children they were not walking close to the cars, but were right out in the middle of the road. They had been up towards 15th street and passed me going towards 11th street, and the next I knew of them was when I heard the boy hollering and saw him being dragged by the car."

Record, pp. 58-59.

He did not know that they had entered any of the cars.

In the late case of *Hammers vs. Colorado Southern N. O. & P. R. Co.*, 55 So. 4, from the Supreme Court of Louisiana, the plaintiff with others went to the street crossing in the town of Eunice where the passenger trains usually stopped for receiving and discharging passengers, to meet a friend expected on the train, and as the day was warm and there was no depot or other shelter provided the persons awaiting the arrival of the train "sought protection against the hot sun that was pouring down wherever they could find it. A line of freight cars, with no locomotive attached, stood there upon the side track, alongside of the main track, the rear end of the hindmost car being on a line, or about

on a line, with the property line of Laurel street, or perhaps impinging a few feet upon what would have been the sidewalk, if there had been one. To get out of the sun plaintiff went under this end car and took a seat upon the rail just back of the front truck of the car, close enough to the wheel for him to have leaned against it.'' Others of his companions seated themselves on cross ties or stretched themselves on the grass, and while thus located an engine and cars backed in on the sidetrack and coupled on to the other end of this line of freight cars and the plaintiff was injured thereby. The court, in disposing of the question, said:

''We do not think that exercise of due care on the part of a railroad company requires it to look under its stationary cars, before moving them, to ascertain whether somebody is not sitting on one of the rails. The learned counsel argue the case as if someone at the crossing, or someone using the crossing, or the space round about it, in the legitimate, ordinary way, had been injured. But plaintiff was not at the crossing. He was close to the front truck of the car, and the car was 36 feet long, and he was using neither the crossing nor the space about it in the legitimate, ordinary way. He was in a position where a lookout on the cars could not possibly have discovered him. And, we repeat, it is not the duty of a railroad company, before attempting to move a stationary car on a sidetrack, to look under the car to ascertain whether somebody may not be under it.''

The same rule is stated by the Supreme Court of Missouri in *Williams et ux. vs. Kansas City, S. & M. R. Co.,* 9 S. W. 573, where a boy twelve years old was playing in defendant's switch yard and was injured when a coupling was made on a string of freight cars

while the boy was sitting on the brake of one of them. The court said:

"The principles of law which are to be applied in cases of this kind are not to be confounded with those which are applied where the party is on the car or track by right, nor with those which regulate the duties of railroad corporations at public crossings, or where the company has violated some statutory or municipal regulation. It has been held in a number of cases, where the party injured or killed was wrongfully on a railroad track—was a trespasser—that, in order to make the defendant liable, it must appear that the proximate cause of the injury was the omission of the defendant to use reasonable care to avoid the injury, after becoming aware of the danger to which the injured party was exposed. *Isabel vs. Railroad Co.,* 60 Mo. 475; *Harlan vs. Railroad Co.,* 64 Mo. 480; *Zimmerman vs. Railroad Co.,* 71 Mo. 477; *Yarnall vs. Railroad Co.,* 75 Mo. 583; *Maher vs. Railroad Co.,* 64 Mo. 267. While the evidence shows that the brakeman when on the ground at the north end of the switch, and when on top of the car, signaled the engineer to stop, yet it is clear he gave the signal, not because he saw the boy on the car or track, but because he supposed the box cars were to be placed on the side-track and not run back on the main track. There is, indeed, nothing to show that either he or the engineer saw or knew that the boy was on or about the flat cars. Not a witness saw the boy on the car at the time of the accident, though some of them were in a more favorable position to see him than the brakeman. There is no evidence upon which to base a liability on the ground that the defendant's servants saw or knew of the danger to which the boy was exposed, and for this reason the plaintiff's second instruction should not have been given. Indeed, the third instruction, given at the request of the defendant, told the jury that there was no evidence that defendant's servants saw or knew that he was on the car or track."

The same court in the later case of *Rushenberg et al. vs. St. Louis, I. M. & S. Ry. Co.,* 19 S. W. 216, in an action for personal injuries resulting in the death of a child eight years old, who was gathering up pieces of ice which had fallen under and around cars standing on a sidetrack which had been loaded with ice, and was under the car, which was one of a long string of cars, when the string was moved by other cars being bumped against it. The court held:

"The operation of railroad trains would certainly be rendered impracticable if it should be declared to be the law that before a freight train could be moved or its cars backed up against one another an inspection would first have to occur of every car to see if by any possibility any trespasser was in a situation to be injured in case the cars were moved."

This case is very similar to the case at bar, as it was claimed that the children were attracted to the cars by reason of the pieces of ice which had fallen on the ground and which, as a matter of fact, would be very attractive to children, but, as in the case at bar, they were where they had no lawful right to be. They were trespassing and the railway company owed them no duty until their presence was known to the employes engaged in moving the cars. As said by the court in this case, the business of a railway company would be rendered impracticable if, before a string of eighteen cars could be moved in its yards, it should be incumbent on the company to have someone personally inspect each of the cars to see that there were no trespassers thereon. Such a duty would render the handling of cars in a large terminal yard impossible without the employ-

ment of a small army of men, especially in a city where there are probably ten thousand children, many of whom run the streets without that parental control and supervision they should receive. Such a rule would make the railroad company the guardian of such children.

In *Wagner vs. Chicago & N. W. Ry. Co.* (Iowa), 98 N. W. 141, a child was playing under the cars in the switch yard when the cars were suddenly moved without warning and without knowledge on the part of the trainmen that the child was under the cars, and it was almost instantly killed. The court said:

"It must always be remembered, in cases of this kind, that a railway company is not an insurer against accidents. Recovery can be had from it when, and only when, it has neglected some duty which it owed to the individual who is injured. Two things are necessary to make out a cause of action—one, a right in the plaintiff, and the other some wrong or breach of duty on the part of the defendant. Railway tracks are known places of danger. They are not made for the use of foot passengers, and ordinarily a railway company has the right to assume that they will not be so used. It certainly may assume that no children are playing about or under its cars, and unless it knows or has reasonable grounds to anticipate their presence it is not bound to look out for them. When it grants a license it is only bound to the extent of its grant."

The same rule is stated by the Supreme Court of Indiana in *Jordan vs. Grand Rapids & I. Ry. Co.*, 70 N. E. 524.

"A boy eight years of age, who climbed on a box car to look at a sale of stock in an adjacent stockyard, was a trespasser.

A railroad company is not required, before moving cars standing on a sidetrack, to examine them to prevent injury to possible trespassers thereon.

A railroad company is not liable for injuries to a trespasser unless the injuries are purposely or recklessly inflicted, or it has knowledge of the injured person's danger in time to have prevented the injury."

In *McDermott vs. Kentucky Cent. Ry. Co.* (Ky.), 20 S. W. 380, where a child about eight years of age was injured by the moving of cars in the yard of the company where it and other children were playing, the court said:

"Accordingly, as moving engines and cars to and fro in the yard of a railroad company is indispensable to safe and proper conduct of its business, it should be no more obliged to specially look out for presence of those who may go there without right than for trespassers on the main track, away from the yard; for to require the bell rung or whistle blown at every movement of an engine in the company's yard to and from a coal chute, water tank or turntable, however slowly or short the distance it might have to go, or that an extra employe be placed upon every backing engine simply to warn or look out for presence of persons having no right, or reasonably expected to be there, when not at all necessary for safety of persons or property legally entitled to care and protection of the company, would be unreasonable and oppressive; and the fact that such trespasser is an infant does not affect the legal right of the company, because signals of approaching engines must be given and oversight of the tracks exercised, uniformly and habitually, or not at all, and for protection and safety of all trespassers or none."

As aptly said by this court, a railway company is not required to provide extra employes to warn or look out for the presence of persons having no right in its

yards, and when the plaintiff in error employed an extra watchman to patrol the tracks in this part of its yards it did more than the law required of it, and such act successfully refutes any claims of acquiescence on its part in permitting persons to enter its yards and cars.

In *Flores vs. Atchison, T. & S. F. Ry. Co.* (Texas), 66 S. W. 709, in which it was alleged that the railway company maintained its tracks in a populous part of the city of El Paso, and that numerous persons, including children of tender years, had been accustomed to pass back and forth under the cars, and that children were accustomed to playing on or near the track, "having been attracted there by defendants' negligence in leaving the cars as they did on the said track, and that defendants, without signals or warning, or without having a proper lookout, moved the cars and ran over the child, which was then about six years of age," etc., the court held:

"Where a string of cars about half a mile long was standing on a railway track, and a child six years old went onto the track, and under one of the cars, without the knowledge of the railway employes, and without any right, the law did not impose on the employes the duty of exercising any care to ascertain his perilous position before driving their engine against the cars."

Shea vs. Concord & M. R. R. (N. H.), 41 Atl. 774.

"An unoccupied lot, on which boys were accustomed to play, lay adjacent to defendant's tracks. Intestate, after playing awhile, crossed the track south of the playground and leaned against a car, which was bumped by others, and he was injured. At the point of the accident there was no passageway. The use of the ad-

joining field as a playground was confined to the portion north of where the accident occurred. There was no evidence that defendant's servants, in the exercise of ordinary care, should have seen intestate and taken precautions for his safety. Plaintiff sued to recover for injuries suffered by intestate. Held, that a motion for non-suit should have been granted."

McEachern vs. Boston & M. R. Co. (Mass.), 23 N. E. 231.

"A declaration alleging that defendant left a freight car standing on one of its sidetracks and negligently allowed the door, which it knew was not properly attached to the car, to remain open and unlocked, knowing that it would be an enticing object to children, and that plaintiff, 11 years old, traveling on the street in the vicinity of the sidetrack, saw the car with its door open, and was thereby enticed to look into it, and in so doing carefully touched the door, which fell upon him, states no cause of action."

Nashville, C. & St. L. Ry. Co. vs. Priest (Ga.). 45 S. E. 35.

"The plaintiff being a trespasser upon the premises of the defendant railway company, it owed her no duty of protection until her presence was actually discovered by its servants, notwithstanding she was a child of tender years; and it not affirmatively appearing from the allegation of her petition that, after she was seen by one of the defendant's employes, the conduct of any of them was so grossly negligent as to indicate a wilful and wanton disregard for her safety, the company's general demurrer should have been sustained."

The same rule has been repeatedly announced by the Supreme Court of Washington. In *Matson vs. Port Townsend Southern R. R. Co.,* 9 Wash. 449, the court said:

"The undisputed proofs showed that none of those operating the railroad train had any reason to suspect the presence of the plaintiff upon the right-of-way until after the accident. This being so, he can get no benefit from the fact of his being of tender years, for, while it is true that the duty of the railroad company to a child, upon discovering him upon its right-of-way, would be different from what it would be in the case of an adult, yet this obligation would not arise until it had notice of his presence. Until it had such notice it owed no duty to him, even though he was of tender years. The plaintiff being a trespasser, and the injury having been committed without any knowledge on the part of the appellant, or any of its agents, of the the fact of his presence in the vicinity, the most that could be claimed in his behalf would be that the company would be liable in case of such gross negligence on its part as was equivalent to wantonness. The proof as to the circumstances surrounding the accident and leading thereto entirely failed to establish any such degree of negligence."

In the case of *Johnson vs. Great Northern Railway Co.*, 49 Wash. 98, two small boys got onto a freight train with the knowledge and consent of the brakeman, and, after riding a distance, they got off at a stop made by the train, and when the train again started they again got on the train without the knowledge of any of the trainmen. The court, in discussing the case, said:

"It seems quite clear from these facts that there is no evidence of negligence on the part of the defendants in this case. If the respondent was a trespasser upon the train, the appellants owed him no duty except not to wantonly or wilfully injure him. It is claimed by respondent that he was not a trespasser, because he was invited by the brakeman to ride on the rear car. It was not shown that the brakeman had any authority to invite any person to ride on the train. On the contrary, it was shown that the train was in charge of the con-

ductor, who was upon it at his station, and that it was generally known that boys were not permitted to ride thereon. The case in this respect is similar to the case of *Curtis vs. Tenino Stone Quarries,* 37 Wash. 355, 79 Pac. 955, where we held that a boy, who had been driven away and subsequently was invited into a dangerous place by persons unauthorized so to do, was still a trespasser.

"But assuming for this case that the respondent here was a licensee, and that the other appellants were bound by the negligence of Kassebaum, it was the duty of the appellants then to exercise reasonable care to see that respondent was not injured. *McConkey vs. Oregon R. & N. Co.,* 35 Wash. 55, 76 Pac. 526. This required the appellants to do no more than an ordinary prudent person would do under the same circumstances. The boys rode with the brakeman on the rear car until they came to Blackman's mill. There the boys got off the train. They did not tell the brakeman that they intended to go further. The brakeman did not see them, and did not know that they were on the train after that time. He did not know where they were, and no other member of the train crew knew that the boys were about the train at all. Before any negligence could be charged against any of the defendants it was necessary to show that they had notice that the boys were on the train and likely to do, or were attempting to do, what they did do. None of these facts were shown. When the boys left the train at Blackman's mill, the brakeman had a right to suppose that they would not again climb onto the cars unless something occurred to notify him otherwise. He certainly could not be held to look after their safety when he did not know, and had no reason to know, that they were on the train. It is true, the boys testified that they might have been seen by the train crew as the train passed around a curve when they were on top of the cars, but it is quite clear that it was then too late to have prevented the injury, even if the trainmen could be held to know it would occur. We see no evidence of negligence in the case sufficient to take it to the jury."

As here said, the brakeman "*certainly could not be held to look after their safety when he did not know and had no reason to know that they were on the train.*" So in the case at bar, the switchman moving these cars did not know and had no reason to know that the defendant in error was in the car.

The rule we are here contending for is the same in the federal court as in the state courts.

"Defendant railroad company opened a freight train at a point where two paths crossing the track converged, near the center of a city block. These paths had been used freely by workmen and others who were accustomed to cross the tracks for a long time. Plaintiff, a boy of 8½, was injured while crossing through the opening between the cars by being run over by the train while being closed together, after he had tripped and fallen over a rail. Held, that plaintiff was a mere licensee, as to whom the railroad company was under no obligation to give warning before the closing of the cut, and that it was therefore not liable."

Schmidt vs. Pennsylvania R. R., 181 Fed. 83.

In *Felton vs. Aubrey,* 74 Fed. 350, from a very lengthy opinion by Judge Lurton, we quote the following:

"If, under the principles we have endeavored to announce, the railway company was entitled to the exclusive use of this track, then the defendant in error was a trespasser, and the company owed him no duty until his danger was discovered. If he was a trespasser, the fact that he was of immature years imposed no higher duty on the company, until his danger was discovered, than if he had been an adult. The railway company was no more required to keep a lookout for infants than for adult trespassers."

If, as we contend, the defendant in error was a trespasser, then the railway company owed him no duty until his presence in the car was discovered by the employes engaged in moving the cars. The evidence clearly shows that he was not discovered prior to his injury, and he could not have been discovered unless the trainmen had walked back about the full length of the string of cars, a distance of about 650 feet. It may be claimed that the switchmen should have seen the little wagon and cart, but the wagon and cart were on the east side of the cars, between the cars and Dock street, and only two or three feet from the cars, and the trainmen were working on the west side of the cars and on the inside of the curve of the track, where their duty required them. Even had they been on the east side of the cars, their view of the north end of the string was shut off by the body of the cars on the curve, unless they had gone east across Dock street.

HOW DID THE ACCIDENT OCCUR?

The defendant in error claimed that he was in the car sweeping up loose wheat at the time the engine coupled onto the cars, and that the jolt threw him out of the side door on the east side of the car, and that he fell under the car so that the wheel passed over his leg. This, we suggest, would be a physical impossibility. The cars are much wider than the track, so that the side of the car overhangs the rail a distance of from thirty to thirty-six inches, and had he been thrown out of the side door of the car he could not have possibly fallen under the same so that the wheel would have passed over his leg.

The witness Raymond, who was called by the defendant in error and who was the only witness to the accident, gave a very clear description of how it occurred. He testified that he heard and saw the cars move north when the engine coupled onto them, and saw the boy reaching under the car in front of the trucks getting his broom, which was lying between the rails. That as the cars moved south the clothing of the boy was caught by the boxing and he was dragged along on the ground and his leg mangled by being caught against the ties. He examined the track and there was no evidence that the wheel had passed over his leg.

The injury to the defendant in error did not occur on a public crossing, but on the private premises of the railway company, on one of its tracks west of Dock street, where there were about six tracks paralleling each other, as shown by the evidence, and the railroad yards widen out after passing north of 11th street, where there is more space between the waterfront and the bluff, and at the foot of 9th street "there are probably fifty or sixty tracks, and usually five or six switch engines are working in there and the switchmen are kept quite busy with their work," as shown by the evidence of the witness Farley.

We believe we have successfully shown to the Court that under the evidence in this case and the law the plaintiff in error is entitled to judgment in its favor.

ASSIGNMENT NO. 1.

Over the objection and exception of the plaintiff in error, the defendant in error and his cousin Maggie

were permitted to testify to conversations had with a man standing at a switch stand under the 11th street bridge to the effect that this man directed them to these cars and told them that there was lots of wheat over there in the cars and that they had better hurry over before other boys and girls got it. Other witnesses were called who testified over the objection of the plaintiff in error that switchmen knew that persons were in the habit of getting wheat out of the cars and that the switchmen made no objection.

This evidence was admitted by the court for the purpose of showing knowledge on the part of the railway company that the plaintiff was in the car at the time he was injured. The ruling of the court is as follows:

"I do not think the permission of this man would be any excuse unless it is shown he had authority. I will permit this testimony for the purpose of showing he had knowledge that the boy was there, but any statement he may have made the jury will disregard."

Record, pp. 24-25.

It was not shown that this man was an employe of the defendant, and even if he was it was not shown that he had any authority to direct or permit persons on the premises or in the cars of the company. Again, even if this man knew that they were in the cars, he was not a member of the crew engaged in moving these particular cars, and it is plain that no member of that crew possessed such knowledge. It was conceded that switchmen had no authority to permit children to enter cars, as shown by the following:

"Q. Has the switchman any authority to permit children to enter box cars?

A. No, sir.

MR. BATES: I understand your honor has ruled as a matter of law that they have not any authority.

THE COURT: I have ruled as a matter of law that there is no testimony in the case up to the present that a switchman has any such authority, and if there is no further testimony on that question I will so instruct the jury.

MR. BATES: We do not intend to introduce any evidence along that line.

THE COURT: In the present state of the testimony I will charge the jury as a matter of law that a switchman has no authority to authorize a person to go in a car for any purpose whatever.

MR. QUICK: Then it will not be necessary to offer any evidence on that question."

Record, pp. 54-55.

It was further shown that all switchmen working in the yards are instructed to keep children off the cars and away from them.

Record, pp. 59.

Even if some switchman working in the yard, in violation of his express orders and duties, permitted or even invited some child into a car, his unauthorized act in doing so would not impose a liability on the railroad company.

In *Curtis vs. Tenino Stone Quarries,* 37 Wash. 355, a boy about six years old was invited into the power house by two other boys who were working there, and

while there pursuant to the invitation, was injured. The court said:

"These two boys were simply employes in the power house. They were not in charge of the building and did not represent or act for the owner in any way. They had no authority to invite strangers there or to impose burdens or obligations upon their employer in so far as trespassers were concerned. There is no pretense that the appellant was invited there by any person authorized to speak for the respondent, or that any officer of the respondent had any knowledge of his presence."

In *Johnson vs. G. N. R. Co.,* 49 Wash. 98, the court said:

"It seems quite clear from these facts that there is no evidence of negligence on the part of the defendants in this case. If the respondent was a trespasser upon the train, the appellants owed him no duty except not to wantonly or wilfully injure him. It is claimed by respondent that he was not a trespasser because he was invited by the brakeman to ride on the rear car. It was not shown that the brakeman had any authority to invite any person to ride on the train. On the contrary, it was shown that the train was in charge of the conductor, who was upon it at his station, and that it was generally known that boys were not permitted to ride thereon."

In *Fischer vs. Columbia & P. S. R. Co.,* 52 Wash. 462, the same principle is asserted, and the decisions of other courts cited, among which is *Flower vs. Pa. R. Co.,* 69 Pa. St. 210, where a locomotive fireman asked a boy ten years of age to put the hose on the tender and turn on the water. The boy, complying with the request, climbed up on the side of the tender when some detached cars struck the tender and the boy was killed, and the

court there held that the act of the fireman was not within the scope of his authority and the company was not liable.

Also the case of *Snyder vs. Hannibal etc. R. Co.,* 60 Mo. 413, where the servants of the company had been in the habit of permitting the injured boy and other boys to jump on the train and ride between certain points in the city, the court held:

"The mere fact that a tortious act is committed by a servant while he is engaged in the performance of the service he had been employed to render cannot make the master liable. Something more is required. It must not only be done while so employed, but it must appertain to the particular duties of that employment."

In *Howard vs. Kansas City, F. S. & G. R. Co.* (Kas.), 21 Pac. 267, the court held that it may be doubted whether it is within the scope of the employment of the brakeman of a freight train to direct persons traveling along a street, and who are not connected with the train or the service of the company, to climb through the train, and that such act of the brakeman would not bind the company.

In *Studer vs. Southern Pacific Co.* (Calif.), 53 Pac. 942, it was held that a boy twelve years old could not recover for injuries sustained by him while climbing through between the cars of a train standing on a public crossing.

In *Russell vs. Central of Georgia Ry. Co.* (Ga.), 46 S. E. 558, it was held that where the only employe of the company who saw and knew that the plaintiff was

attempting to pass through a train by climbing over the bumpers at a public crossing was a watchman, such knowledge was no notice to or knowledge by the company.

In *Southern Railway Co. vs. Clark* (Ky.), 105 S. W. 384, it was held that where a person was injured by attempting to climb over a freight train at a public crossing at the invitation of the brakeman and was injured, the railway company was not liable.

In *Daugherty vs. Chicago, M. & St. P. Ry. Co.* (Iowa), 114 N. W. 902, a boy seven years old was invited by the section men to get on a handcar for a ride. The foreman ordered the men to help the boy on the car, and while the car was moving the boy fell off and was injured. The court held: *"An act done by a servant while engaged in his master's work, causing injury to a third person, but not done for the purpose of performing that work, can not be deemed the act of the master."*

Although the boy was placed on the handcar by the section men at the direction of the foreman, such act on their part was outside the scope of their authority and did not render the master liable for injuries received by the child.

"An employer is not bound by the act of his employe, not his *alter ego,* in inviting or permitting children to be upon the premises."

Formall vs. Standard Oil Co. (Mich.), 86 N. W. 946.

The rule is stated as follows by Judge Phillips, speaking for the Court of Appeals, Eighth Circuit, in quoting from the case of *Eaton vs. Delaware R. Co.,* 57 N. Y.

394, in the case of *Clark vs. Colorado & N. W. R. Co.*, 165 Fed. 408:

"But it is said that by the act of the conductor the plaintiff was lawfully on the train, and that for this reason the defendant was liable to him for the negligence of its servants. With due submission, this is simply begging the question. The plaintiff could only be lawfully on the train by an authorized act of the conductor. The question still recurs: Had the conductor the authority to take plaintiff on the train? If not, he could not lawfully be there. It is not necessary to consider whether he was a trespasser. It is enough to hold that a duty to be careful toward him would only spring up on the part of the defendant by an act on the conductor's part coming within the scope of his authority."

In these cases some employe of the railway company knew of the perilous position of the person injured, and in some of the cases the person injured was placed in such position by the invitation of some employe acting outside the scope of his authority, but such knowledge or such invitation did not impute notice to the master, or impose on the master a liability for the injury sustained. So in the case at bar. The person whom it is claimed directed the plaintiff to the car to get the wheat, even if he was a switchman, was acting outside of his authority and not performing any duty in relation to the services he was employed or directed to perform for the master.

So, if the switchmen had no authority to permit children in the cars—and this is conceded—then knowledge on the part of such switchmen that children sometimes did get on the same would not be notice to the company of that fact. But in this case the evidence is uncontra-

dicted that the switchmen handling these cars had no notice or knowledge that there were any children thereon.

ASSIGNMENT OF ERROR NO. 4.

The court instructed the jury as follows:

"If you find that at the time of the injuries complained of in the complaint, and for some time prior thereto, children and other persons were in the habit of continuously going upon the premises in question and into the box cars situate upon the defendant's track and sweeping the wheat up and gathering the wheat from in and about said cars, and if the defendant, its servants and employes knew of such custom, or by the exercise of ordinary care and observation could have known of it, then I instruct you that the defendant Railroad Company owes the duty to persons so going upon the cars or track to use reasonable care to avoid injuring them. By reasonable care is meant that degree of care that an ordinarily prudent man would use under like circumstances and conditions. The degree of care to be exercised may be measured by the danger to be apprehended.

You are instructed that in determining whether or not the defendant, its servants and employes were guilty of negligence causing the accident, and in measuring the standard of care to be used by the defendant and its servants and employes at and about the point where and the time when the accident occurred, you should take into consideration the custom and habits of children and the public generally in going in and upon the cars and tracks of the defendant for the purpose of getting wheat, and that due and ordinary care should be used to prevent accidents to not only men and women of mature age and experience, but also to children of tender years who might have occasion to be in or about said cars, or might have been in the habit of being in or about said cars."

Record, pp. 61-62.

The plaintiff in error duly excepted to the giving of this instruction for the reason that it "imposes upon the defendant the duty of exercising ordinary care to prevent accidents to trespassers, and would make the defendant liable for an injury received by the plaintiff where the defendant was without knowledge that plaintiff was upon its cars or in a place of danger."

Record, pp. 65-66.

If the defendant in error was a trespasser—and under the uniform holding of the court he certainly was—then this instruction was clearly erroneous and prejudicial. By its terms the Railway Company is made the general guardian of all persons who wrongfully enter upon its premises, and especially of those who have entered there for an unlawful purpose. As frequently stated by the courts, the rule is the same as to children as it is to adults who are trespassers. The fact that the defendant in error was only 11 years of age at the time he was injured does not change his legal status or impose any additional burden upon the Railway Company. In these railroad yards, extensive as they are shown to be by the evidence in this case, it is quite frequent that persons, both in the daytime and in the night time, enter the yards for the purpose of stealing merchandise from the cars, and thefts of this character are often committed. Let us suppose that the defendant in error in this case was an adult and had gone into the yards where there were cars loaded with merchandise, and had gone into one of such cars for the purpose of stealing articles of merchandise from it, and while there he had been injured in the same manner as this accident occurred. Would the court, for one

moment, hold that the Railway Company was responsible? The purpose for which the defendant in error entered the cars was no more lawful than in the case we have suggested. His infancy and lack of knowledge and experience in no way changes the rules of law applicable thereto, and no other or greater duty was owed him than if he had been an adult engaged at the time in stealing merchandise from the cars. The instruction, therefore, imposed upon the Railway Company a duty and obligation not sanctioned by law, and one which would make the company an insurer of the safety of every person wrongfully entering its railroad yards or there for an unlawful purpose. There is no claim anywhere in the evidence that the switching crew handling these cars knew, or by the exercise of ordinary care consistent with the usual and ordinary mode of handling its cars, should have known, of the presence of the defendant in error.

We, therefore, respectfully insist that the judgment in this case should be reversed, and also that an order be entered dismissing the case.

Respectfully submitted,

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